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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

In re D. L., et al., Persons Coming Under  
the Juvenile Court Law.

B166398  
(Los Angeles County  
Super. Ct. No. CK 41085)

DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES, LOS ANGELES  
COUNTY,

Plaintiff and Respondent,

v.

G. L.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.

Thomas E. Grodin, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Mary Elizabeth Handy, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Pamela S. Landeros, Deputy  
County Counsel, for Plaintiff and Respondent.

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G. L., the mother of D. and Ali, appeals from the order terminating her parental rights. At the time of the order, D. was almost four years old and Ali was almost two years old. Mother contends that she established the exception to terminating parental rights set forth in Welfare and Institutions Code section<sup>1</sup> 366.26, subdivision (c)(1)(A) and that substantial evidence supported legal guardianship, not adoption, as the permanent plan. We affirm.

### **FACTUAL AND PROCEDURAL SYNOPSIS**

In November 1995, mother lived in Arizona and came into contact with child protective services when her two-month-old daughter B. suffered blunt force brain trauma. The injuries reportedly occurred when mother left B. and her older daughter Monique in the care of a friend, whom mother knew to be abusive and violent. The Arizona Superior Court removed the children from mother's care and declared Monique a dependent of the court. B. died as a result of her injuries in March 1996. The Arizona Superior Court terminated mother's parental rights as, despite 18 months of services, she failed to remedy the circumstances which caused Monique to be in out-of-home placement.

Mother moved to Los Angeles. In September 1999, respondent Los Angeles County Department of Children and Family Services ("Department") received a referral alleging that D. was the victim of severe neglect. At the initial assessment, the Department noted mother appeared appropriate, protective and bonded to her infant. However, after reviewing numerous records, the Department placed D. in protective custody and filed a section 300 petition on his behalf. The juvenile court ordered D. detained in foster care and granted mother and father<sup>2</sup> monitored visitation.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Father is not a party to this appeal.

At the January 2000 pretrial resolution conference, the Department reported mother denied any responsibility for B.'s death. The court released D. to the care of his paternal aunt.

In March, the Department reported mother and father visited D. every Saturday and Sunday and called during the week to check on their baby. According to the paternal aunt, the parents were appropriate and loving with D. and brought milk and diapers to her home. Mother had completed a parenting class in 1999 and was currently enrolled in individual counseling.

In April, the court sustained the petition, declared D. a dependent, and ordered the Department to provide family reunification services, including monitored visitation for mother. The court also ordered mother to attend individual counseling and parent education.

By June, mother continued to participate in individual counseling and reportedly was "very compliant, cooperative and highly motivated to reunify with minor, D [.]". Mother visited D. regularly and, according to the paternal aunt, was loving and appropriate with her child.

At the six month judicial review on October 5, the Department reported mother continued to attend individual counseling. Mother and father visited D. three to five times per week, interacted positively with the child, and were cooperative at all times. The court granted mother unmonitored visitation and ordered the Department to provide an additional six months of family reunification services, with continued discretion to liberalize overnight visitation.

In April 2001, the Department reported mother continued to visit D. consistently, but her participation in counseling had become inconsistent and sporadic. Both parents had enrolled in a 52-week domestic violence program. The Department recommended a permanent plan of long-term foster care.

However, the Department subsequently discovered that on February 4, father had been arrested for domestic violence. Mother and father claimed it was merely a "verbal

argument.” The police report revealed that father had physically assaulted mother. When the police arrived, mother said father had grabbed her by her neck and forced her into his car. After mother escaped, father caught up with her, grabbed her by the neck, and choked her. A nearby witness saw father drag mother across the street and slam her into the pavement.

After mediation, the court ordered the Department to provide further family reunification services. The court ordered weekend and overnight visits and for the parents to continue with domestic violence counseling.

In June, the Department reported mother had been placed on bed rest due to complications with her pregnancy on April 27. Although mother was unable to attend counseling or classes, the parents continued to visit D. every weekend, and the child appeared happy and content in their company. A social worker evaluated the parents’ home for placement and found it clean, well kept and safe. The court terminated the suitable placement order, released D. to his parents, and ordered the family to participate in family preservation services.

Four months later, the Department received a child abuse referral alleging D. had been physically abused. Mother had taken D. to the hospital claiming he had a diaper rash. Father said that when he had changed D.’s diaper the previous morning, the child’s skin peeled off; he thought it was the result of a chocolate Ex-Lax pill D. had eaten the day before. After examination, the doctors determined D. had second degree burns on both sides of his buttocks. A social worker referred D. to Harbor/UCLA Medical Center for additional observation and treatment. The doctors at Harbor/UCLA said D.’s injuries were inconsistent with the parents’ explanation.

The Department placed a hospital hold on D. and filed a section 342 petition. The Department also detained Ali, D.’s newborn sibling, and filed a section 300 petition on his behalf. At the parent’s request, pursuant to Evidence Code section 730, the court appointed Dr. Matt Young to determine whether D.’s burns had been inflicted or were accidental.

On October 22, the court removed the children from the parents' custody, but authorized monitored visitation. The court placed both children in the home of the paternal aunt.

In December, Dr. Young reported D.'s burns were "consistent with an inflicted injury most likely the child being placed in standing hot water."

At the December 7 pre-trial resolution conference, the Department reported that father had been arrested twice for drug possession and that the parents were visiting consistently once a week and behaved appropriately with the children. The parents adamantly denied any knowledge of how D. had been burned and insisted they had done nothing wrong.

On March 8, 2002, the court adjudicated both petitions, found D.'s injury had been inflicted, sustained the petitions as amended, and continued the matter for a contested disposition.

Prior to the disposition hearing, the Department reported it had removed the children from the paternal aunt's care; on April 11, she had permitted an unmonitored visit with the children in the parents' home. During that visit, there was an altercation in which father shot mother in the neck in the presence of both children. According to mother's statements to the police, father had entered the bedroom where she was with the children and demanded sex. When mother refused, father pushed her onto the bed, spread her legs and penetrated her. Mother broke free and was checking on the children when father shot her. Mother, who was six months pregnant at the time, was hospitalized for her injuries and obtained a restraining order against father, who was arrested on April 14.

Despite the restraining order, mother contacted father. After speaking with father, mother told the Department the police report was "full of lies." Mother claimed that father had not forced her to have sex with him and that the children had not been in the room during the shooting.

The contested disposition hearing was held on July 17. The court denied further family reunification services finding mother had not made reasonable efforts to treat the problems which led to the dependency of her children and offering further services would not be in their best interest. The court set a section 366.26 hearing.

Mother filed a writ petition challenging those orders. This court affirmed the juvenile court's orders.

At the initial section 366.26 hearing, the Department recommended adoption as the permanent plan. The Department reported that although mother visited the children on a weekly basis, it was Rosemary, their caretaker, who stood in the parental role. Rosemary provided the children with all the basic necessities, including a structured and nurturing environment, and the children had developed a bond with Rosemary. Although Rosemary preferred to become the children's legal guardian, she was willing to adopt them if the court terminated parental rights. The court continued the hearing.

On January 15, 2003, the Department reported an adoption social worker met with Rosemary, and the home study had been initiated. The court set the matter for a contested hearing.

The day before the contested hearing, mother filed a section 388 petition asking the court to return the children to her care or permit overnight, weekend visits or unmonitored day visits. Mother alleged she was living in an apartment with her new son who was not a dependent of the court; she had a supportive extended family network; she had completed court-ordered treatment programs without the assistance of the Department; and she regularly visited her children on a weekly basis for two hours at a time. Mother claimed she was bonded to the children and had no intention of continuing her marriage although she had not filed for divorce due to lack of funds. Mother provided various documents with her petition.

The court continued the section 366.26 hearing and held a contested hearing on the section 388 petition. The court denied the petition finding the documentation was old

and did not suggest there had been an “adequate change in circumstances” or that the proposed order would be in the children’s best interest.

The contested section 366.26 hearing commenced on April 10. The court received into evidence certain reports, took judicial notice of the sustained petitions and heard testimony. Rosemary testified that she had known both children from the time they had been born and that she had been D.’s day care provider when he lived with his paternal aunt. In July 2002, D. had spoken to Rosemary on the telephone and asked her to “please come and get him.” The Department had placed the children with Rosemary on July 16, 2002.

Rosemary testified since the children had been in her care, she monitored mother’s visits at her home, once or twice a week for two hours. During the visits, which sometimes included the mother’s new baby, mother would play with the children and read to them. Once, mother fed the children during the visit.

According to Rosemary, Ali did not interact much with mother and did not spend the entire visit with her. Although mother sometimes changed Ali’s diaper, if Ali needed something while he was with mother, he went to Rosemary. Occasionally, Ali would fall asleep in Rosemary’s arms during the visit. When the visit ended, Ali simply said goodbye; he did not cry or ask for mother when she was not there. Sometimes, mother called to ask about the children, but she never assisted or attended doctor’s appointments when a child was sick.

Ali and D. were close; “they play with each other and sort of take care of [] each other.” D. called mother “mama” and talked and played with mother during her visits. If D. needed anything while mother was there, he asked Rosemary. At the end of the visit, D. said goodbye and did not cry. When D. did not see mother, although he would ask where she was, he did not ask to see mother. D. spoke with mother on the telephone and seemed excited to have contact with her. When asked if D. was attached to mother, Rosemary replied, “D[.] knows who his mother is.” Due to D.’s age, he had more of a bond to mother than Ali. D. had told Rosemary he loved mother.

Mother testified that while D. lived with his paternal aunt, she visited an average of four times per week. Since the children had been placed with Rosemary, mother visited once or twice per week.

When mother arrived for a visit, the children were excited and approached her for a hug. During the visits, mother recited the alphabet and numbers, sang, and talked with the children. Mother confirmed that D. did not cry when the visits ended, but he asked why she had to leave. Mother called D. three or four times a week. Mother claimed Ali responded to the visits in a positive manner, but acknowledged her relationship with D. was stronger.

After taking the matter under submission, the court found that although mother had visited both children consistently, her visits remained monitored; “[m]other’s history of visitation does show consistency in number but not in quality.” In finding mother had not demonstrated the children would be greatly harmed if parental rights were severed, the court considered the children were very young, they had spent a “negligible” amount of time in mother’s care, there had been no showing of an emotional attachment between mother and children, and the children need permanency to get away from the cycle of violence and inappropriate conduct. The court then found the children were adoptable and terminated parental rights.

Mother filed a timely notice of appeal from the termination order.

## **DISCUSSION**

Mother contends the court erred in finding termination of her parental rights would not be detrimental because she showed that she had the parental relationship contemplated by section 366.26, subdivision (c)(1)(A) and that to sever that relationship would be harmful and contrary to the children’s interest in permanency. Mother also contends substantial evidence did not support adoption as the most appropriate plan. We disagree.

## **I. Section 366.26, subdivision (c)(1)(A) Exception**

Although courts have applied a substantial evidence test to the finding under section 366.26, subdivision (c)(1)(A), some courts have determined abuse of discretion is the appropriate standard of review, but noted that the practical differences between the two standards are not significant in this situation. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

“The parent has the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A).” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

A parent must show “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

“The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and child, and (4) the child’s particular needs.” (Fn. omitted.) (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

In the instant case, the juvenile court found mother visited the children consistently, but her visits had not progressed from monitored visits. Mother urges she met her burden to prove the relationship was beneficial noting the children were still very young, her relationship with D. and Ali was affectionate and she was bonded to them, D. called her “mama” and expressed love for her. Mother also suggests she proved the harm

of extinguishing her relationship with her children outweighed the benefit of having the most permanent home possible as less detrimental alternatives existed. In mother's opinion continuing their bond with her would constitute security for her children.

“Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. The relationship arises from day-to-day interaction, companionship and shared experiences. The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.”<sup>3</sup> (Citations omitted.) (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

“To overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show that severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed. A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent.” (Citations omitted & emphasis deleted.) (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

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<sup>3</sup> A 1998 amendment to section 366.26 adding the need for “a compelling reason for determining that termination would be detrimental to the child,” “makes it plain that a parent may not claim entitlement to the exception provided by subdivision (c)(1)(A) simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349.)

The record shows that while mother had a positive relationship with her children, it was not the strong, positive, emotional attachment envisioned by section 366.26, subdivision (c)(1)(A). As noted by the court, the children were still young, a factor in favor of termination of parental rights, and they had spent a negligible amount of time in mother's care. Mother did not occupy a parental role with her children; rather they looked to Rosemary to met their basic needs and provide parental guidance and nurturing, even during mother's visits. There was no evidence of a need which could be met by mother, but not by Rosemary. Finally, there was no evidence of any harm, much less great harm, which would befall the children if their relationship with mother was terminated. Accordingly, the court did not err when it terminated mother's parental rights.

## **II. Guardianship**

Mother asserts that substantial evidence showed guardianship offered true security. "In selecting a permanent plan for an adoptable child, the court must bear in mind the basic preference for adoption over nonpermanent forms of placement, including guardianship. 'The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them.'" (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728; see also *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) Thus, the court did not err in freeing the children for adoption.

## **DISPOSITION**

The order is affirmed.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

MUÑOZ (AURELIO), J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.